IN THE

Supreme Court of the United States

October Term, 1977

No. 77-778

CYRUS HASHEMI,

Petitioner,

—vs.—

INTER-REGIONAL FINANCIAL GROUP, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States

The petitioner, Cyrus Hashemi, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit rendered in these proceedings on September 1, 1977.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, dated September 1, 1977, as yet unreported, appears at Appendix A. (*Infra* 1a). The

judgment of the United States District Court for the District of Connecticut, dated September 28, 1976, appears at Appendix B. (*Infra* 8a). The judgment of the District Court is based upon the opinion of the Honorable Jon O. Newman, Judge of the District Court, dated October 28, 1976, which is unreported, and appears at Appendix C. (*Infra* 12a). Finally, the opinion of Judge Newman denying the defendant's motion for reargument, dated April 12, 1977, similarly unreported, is also relevant, and appears at Appendix D. (*Infra* 18a).

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on September 1, 1977. (Appendix A, *infra* 1a). This petition for certiorari was filed less than ninety days from the aforesaid date. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented

The respondent (plaintiff below) commenced an action in the United States District Court for the District of Connecticut, based upon a claim in excess of Ten Thousand Dollars, and diversity of citizenship, seeking an award of money damages against the petitioner (defendant below). In conjunction with the filing of the complaint, the respondent sought a prejudgment remedy order of attachment of securities owned by the petitioner, and a mandatory injunction order in support of this request for prejudgment attachment. The District Court found probable cause for the granting of the respondent's application for a prejudgment remedy, and issued a mandatory injunction order directing the petitioner to surrender a particular dollar amount of securities to the clerk of the Court for the sole purpose of attachment. (Appendix B, *infra* 10a). This Court of Appeals affirmed. The questions presented are:

(1) Did the Court of Appeals err in affirming the order of the District Court, which issued a mandatory injunction directing the petitioner to deposit securities located outside of the United States and outside of Connecticut in the District Court for the District of Connecticut for the sole purpose of permitting the respondent to perfect an attachment?

(2) Did the Court of Appeals, in affirming the District Court, err in exercising jurisdiction over assets of the petitioner which are not now, and have never been, in the United States, based upon a statute of the State of Connecticut?

(3) Is the scope and nature of the District Court order, as affirmed by the Court of Appeals, in a prejudgment remedy proceeding, a denial of due process under the Fourteenth Amendment to the Constitution of the United States?

(4) Did the Court of Appeals, in affirming the District Court order, misapply the Connecticut statute, which is a portion of the Uniform Commercial Code?

Constitutional Provisions, Statutes and Regulations Involved

The jurisdiction of the District Court in this case is based upon diversity of citizenship and the claim by the respondent in excess of Ten Thousand Dollars. 28 U.S.C. Sec. 1331(a). The respondent's application for a prejudgment remedy was made pursuant to the applicable provisions of the Connecticut General Statutes, Sec. 52-278a through 52-278n, concerning the procedures to be followed in order to secure an order of attachment. In

addition, concerning the particular securities to be attached, Sections 52-289 and 42a-8-317 of the Connecticut General Statutes are also applicable.[1] (Copies of excerpts from the Connecticut General Statutes are attached as Appendix E, *infra* 21a, 22a). The latter two sections define the rights or legal interests which may be attached, and the manner of attaching shares of corporate stock or other corporate rights or securities, as defined by the Uniform Commercial Code. Since this is a diversity case, the applicable Connecticut statutes were applied by the District Court by virtue of Rules 64 and 65 of the Federal Rules of Civil Procedure. Finally, the constitutional provision is the due process clause, Amendment IV, Section 1, of the United States Constitution.

Statement of the Case

On or about November 28, 1975, Coronado Group Limited (hereinafter referred to as "Coronado") borrowed the sum of $250,000 from Banque Scandinave en Suisse (hereinafter referred to as "Banque Scandinave"), pursuant to a loan agreement. The loan to Coronado from Banque Scandinave was secured by an irrevocable Letter of Credit issued by the First National Bank of St. Paul, and an Indemnity and Guaranty Agreement was executed by the parties in order to further secure the loan.

[1] Sec. 42a-8-317 of the Connecticut General Statutes is Sec. 8-317 of the Uniform Commercial Code. This provision of the Uniform Commercial Code has been adopted, together with the rest of the Uniform Commercial Code, in the District of Columbia and in all states except Louisiana, which has not adopted Article 8, but has adopted other portions of the Uniform Commercial Code. (1 *Uniform Laws Annotated*, Master Edition, "Uniform Commercial Code", 1977 Supplement, Page 5).

The respondent's complaint alleges that in July, 1976, the First National Bank of St. Paul paid the sum of $250,000 to Banque Scandinave pursuant to the Letter of Credit, and that it in turn paid the First National Bank of St. Paul. Suit was thereafter commenced against the petitioner alleging a breach of the terms of the Indemnity and Guaranty Agreement.

Since this appeal arises from the granting of a mandatory injunction in aid of a prejudgment remedy application, there has not yet been a full development of the issues in the case below, and there has not been a full trial on the merits. However, a basic review of the legal positions of the parties would be appropriate.

Both the petitioner and the respondent were major stockholders of Coronado, and each were represented on the Coronado Board of Directors. The respondent was to provide "financial accommodations" up to the amount of $250,000 prior to the close of business on December 31, 1976. No financial accommodations were provided by the respondent. In addition, even though an extension of the loan agreement was granted by Banque Scandinave, the respondent elected not to advance an interest payment in order to prevent the default by Coronado.

As a result, the petitioner has asserted a breach of the Agreement, and a failure of its consideration, thereby rendering it void and unenforceable. Secondly, he has asserted that this action was premature in that the loan agreement could have been extended if the respondent had fulfilled its obligations. The petitioner, in his counterclaim, has alleged that various representatives of the respondent on the Coronado Board of Directors caused it to be in default on the loan agreement for the corporate purposes of the respondent, in breach of the director's

fiduciary duty to Coronado,[2] as well as other misconduct which resulted in a petition for liquidation of Coronado.

It is clear from this cursory examination that there are substantive questions in dispute between the parties, and complex factual and legal issues to be litigated.

For the purpose of this petition, the important question does not involve the finding of probable cause for the issuance of the order by the District Court,[3] but the scope of the prejudgment remedy order. After making certain findings of fact, including a finding that the petitioner's securities are located outside of the State of Connecticut, and substantially all of them outside of the United States (Finding 10, *infra* 9a), Judge Newman concluded that there was probable cause for the granting of a prejudgment remedy, and that an injunction order should issue in aid of an attachment. (Finding 11, *infra* 10a). He ordered the deposit of securities with the clerk of the Court. (*Infra* 10a).

During the pendency of the case before the Court of Appeals, and prior to its decision, the respondent moved for a finding of contempt, and the petitioner moved for reargument. Although Judge Newman denied the motion for reargument for jurisdictional reasons, footnote 2 to his opinion is particularly instructive. (Appendix D, *infra* 19a).

[2] Although the respondent has moved to dismiss the first count of the counterclaim, it has conceded that one count is properly before the Court. Judge Zampano has not yet ruled on the motion to dismiss.

[3] The defendant, of course, does not concede that probable cause exists. However, the important question on appeal is one of law.

At the time of the contempt hearing, the petitioner testified that his securities were not at that time, and had never been, in the United States. (Appendix F, *infra* 24a).[4] There is no claim by the respondent in its complaint or otherwise that there has been any fraudulent transfer of the petitioner's securities outside of the United States to avoid legal process, nor is there any claim that any of his securities are the subject matter of the litigation between it and the petitioner.[5]

Thereafter, the United States Court of Appeals for the Second Circuit affirmed the District Court order. While finding that the order was appealable, since it was in the nature of a mandatory injunction, the Court of Appeals held that the District Court order met the requirements of Connecticut law, and that there was no denial of procedural due process. (Appendix A, *infra* 7a).

For the reasons set forth below, it is respectfully submitted that the order of the United States Court of Appeals affirming the District Court order was in error.

[4] The only basis for the Connecticut involvement in this case is diversity jurisdiction obtained over the petitioner, a resident of Connecticut. Other assets were seized under the Connecticut attachment statutes, and the petitioner substituted a bond in lieu of attachment.

[5] There has not yet been full compliance with the District Court order to bring securities into the United States for attachment purposes, because of difficulties which the petitioner has experienced under Iranian law in liquidating the securities and transferring the assets to the United States.

Reasons for Granting the Writ

A. The decision of the Court below is in conflict with decisions in other jurisdictions interpreting the portion of the Uniform Commercial Code applicable here.

The statute upon which the District Court and the Court of Appeals relied, Sec. 42a-8-317(2) of the Connecticut General Statutes, is Sec. 8-317 of the Uniform Commercial Code. Since the same statute is in effect in virtually all of the states, and in the District of Columbia, we have an important question involving uniformity of interpretation of a statute. However, before discussing this point in detail, we must consider the essential elements of an attachment order.

There is no federal statute permitting an attachment. The only authority for the order of the District Court, which is the subject of this petition, is the Connecticut statute. Any order issued by the District Court must be based upon existing state law, and applied in the Federal Court pursuant to Rules 64 and 65 of the Federal Rules of Civil Procedure. *Huron Holding Corporation* v. *Lincoln Mine Operating Company*, 312 U.S. 183, 61 S.Ct. 513, 85 L.Ed. 1143, Reh. Den., 313 U.S. 598, 61 S.Ct. 840, 85 L.Ed. 150; *Chambers* v. *Blickle Ford Sales, Inc.*, 313 F.2d 252 (2d Cir. 1963). Secondly, under the common law of the State of Connecticut, an order of attachment is not a right, but rather is a matter strictly governed by statute. *Clime* v. *Gregor*, 145 Conn. 74, 75, 138 A.2d 794 (1968); *Ledgebrook Condominium Association, Inc.* v. *Lusk Corporation*, 172 Conn. 577 (1977).

Although the Uniform Commercial Code deals with a number of subjects, Sec. 8-317 is a portion of the Code dealing with investment securities. The purpose of

Article 8 of the Uniform Commercial Code is not related to attachment or garnishment in any way, but rather deals with the sale and transfer of securities. "It has been called a negotiable instrument law of investment securities." (Official Commentary to Uniform Commercial Code, Sec. 42a, Article 8, Connecticut General Statutes, at 253). It is primarily intended to deal with the rights of various parties involved in the sale and transfer of corporate securities, including shares of stock. *Burns* v. *Gould*, 172 Conn. 210 (1977). If Sec. 8-317 deals with attachment in any way, it is only in an incidental and insignificant manner. While there may be some instances where, as a result of the transfer or sale of a security, certain extra-territorial effect may be given to the statute between parties to the transaction, and certain injunction orders may be issued by the court with regard to a security which is the subject of a dispute, it is clear that Sec. 8-317 does not apply to the attachment of shares of corporate stock which are not involved in the underlying transaction.

The Court of Appeals disregarded the provisions of Sec. 52-289 of the Connecticut General Statutes, which specifically deals with the question of attachment of shares of corporate stock, and found it inapplicable. It should be noted that Sec. 52-289 is the only statute in Connecticut which gives any right of attachment of corporate shares of stock. If Sec. 52-289 is inapplicable, then there is no Connecticut statute which authorizes attachment of shares of capital stock. Under Sec. 52-289 there are three essential steps for a valid attachment of stock or other rights in a corporation: (1) service must be made on the defendant personally or at his usual place of abode; (2) service must be made on the corporation; and (3) the shares of stock must be seized by the officer making the levy. The net effect of this requirement is to limit orders of attachment of corporate rights

in shares of stock in Connecticut corporations. *Winslow* v. *Fletcher*, 53 Conn. 390, 4 Atl. 250 (1885); *Barber* v. *Morgan*, 84 Conn. 618, 81 Atl. 791 (1911).

In *Winslow* v. *Fletcher*, *supra*, the defendant, who resided in the State of Indiana and owned stock in an Indiana bank, deposited a stock certificate with a blanket power to sell and transfer with an insurance company in Connecticut. The Court held that even though the stock was physically located in Connecticut, and subject to seizure here, it could not be attached. The Court pointed out that, while the certificates are evidence of ownership, and for some purposes may be regarded as property, they are distinct from the stockholder's interest in the capital of the corporation, and therefore are not "goods and effects within the meaning of the statute relating to foreign attachment." (*Supra* at 396). In conclusion, the Court stated the following:

> Thus, the question before us in one aspect of it, resolves itself into the question of the construction of our statute. Obviously, the statute can have no operation outside the limits of the state. When it speaks of "rights or shares in the stock of any corporation", it has exclusive reference to corporations existing under our laws, and it cannot affect the rights in corporations existing under the laws of other states. Therefore the statute referred to does not authorize the attachment of the defendant's interest in the stock in question.
>
> It is further contended that this interest may be attached under the general statute relating to attachments, it being the policy of our law to subject all a man's estate not specifically exempt to the payment of his debts. But that statute relates to ordinary process and not to the process of foreign attachment; it is limited and must be limited, to property in this state; it has and can have no extra-territorial operation. (53 Conn. at 400).

Section 52-289 of the Connecticut General Statutes continues in full force and effect. The general law of this State concerning attachment of corporate rights or shares and this statute has remained unchanged for a number of years, except in one important respect. The Uniform Commercial Code was adopted as 1959 Public Act 133, effective October 1, 1961. Consequently, any applicable provisions of the Uniform Commercial Code, including Sec. 42a-8-317 of the Connecticut General Statutes, must be read consistently with Sec. 52-289.

In addition, although some states have enacted legislation authorizing attachment of a defendant's shares of stock in any corporation, including a foreign corporation, Connecticut has not adopted such legislation. (7 *CJS*, "Attachment", Sec. 79, notes 26 and 28). However, regardless of the law in other states, it is clear that any attachment order to be valid must follow the mandatory requirements of Connecticut law.

Prior to the adoption of the Uniform Commercial Code, Connecticut adopted the Uniform Stock Transfer Act. The former Sec. 33-87 of the Connecticut General Statutes, being the Connecticut equivalent of the Uniform Stock Transfer Act, added a requirement to Sec. 52-289 of the Connecticut General Statutes, which provided that an attachment or levy upon shares of stock was ineffective "until such certificate is actually seized by the officer making the attachment or levy, or is surrendered to the corporation which issued it, or its transfer by the holder enjoined." [6] However, it is clear that even under this

[6] Sec. 33-87 was repealed by the adoption of the Uniform Commercial Code (1959 Public Act 133), which replaced the entire Uniform Stock Transfer Act.

provision, while a transfer by the *holder* might be enjoined, it clearly applied only to stock in Connecticut corporations, and the three-step procedure outlined above was required. While under the former statutory provision, an order enjoining transfer pending perfection of the attachment might have been issued, there was no such authority for an injunction order directing surrender of the securities for the purpose of attachment. Consequently, unless there has been a change in pre-existing Connecticut law brought about by the adoption of the Uniform Commercial Code,[7] it is clear that Connecticut law does not now authorize, and has never authorized, a mandatory injunction as issued by the District Court. As a matter of fact, the language of Sec. 42a-8-317 specifically states that the security must be seized, or surrendered to the issuer at its source, and if other orders of the court are issued as an aid to reach the security in question, it can only be done "as *is allowed* at law or in equity." (Emphasis added). Thus, the section does not expand the existing law, but merely refers to it and incorporates it by reference. (Stephenson, *Connecticut Civil Procedure*, Sec. 66c at 269-270). There is no decision of any court interpreting the Uniform Stock Transfer Act or the Uniform Commercial Code to permit the application of the order issued by the District Court.

The Court of Appeals relied upon two Connecticut decisions, one in the State Court and one in the Federal Court. The State Court action, *White* v. *Leary*, 6 Conn. Supp. 37 (1938), was not a judgment of the highest court of the State. However, the Judge of the Superior Court issuing the order in that case was dealing with a corporate dispute involving the stock of a Connecticut

[7] Sec. 42a-8-317 has two paragraphs. The first parallels the former Sec. 33-87, but makes language changes not relevant herein. However, the second paragraph has the exact same language as the former Sec. 33-88.

corporation. Thus, the attachment order was thoroughly consistent with Sec. 52-289 of the Connecticut General Statutes, and the cases cited above. It was not a case decided under the Uniform Commercial Code, or its predecessor, the Uniform Stock Transfer Act. This is the only State Court authority on point, and is consistent with the petitioner's interpretation of Sec. 52-289 of the Connecticut General Statutes, and the interpretation of Professor Stephenson.

This brings us to the legal effect of the decision in the case of *Fleming* v. *Grey Manufacturing Co.*, 352 F. Supp. 724 (D. Conn. 1973). Both the Court of Appeals and Judge Newman relied upon and followed this case in rendering their respective decisions. However, in his memorandum of decision, Judge Newman cast considerable doubt on the applicability of the *Fleming* case, and indicated that in the absence of that case, he might have decided the question differently. (See Appendix D, footnote 2, *infra* 19a). Secondly, insofar as *Fleming* may be read so as to imply that such relief may be granted under Sec. 8-317 of the Uniform Commercial Code, it is contrary to Connecticut law and should be overruled. The case involved a breach of contract action in which the plaintiff sought to attach stock owned by the defendant in subsidiary and affiliated corporations. The contract in question dealt with an agreement for the sale of stock of a New York corporation, which stock was owned by various inter-related corporations, including two Connecticut corporations, which were the main defendants. The Court did not order that stock be brought into Connecticut for the purpose of attachment. Rather, the Court merely granted injunctive relief with regard to the transfer of the stock in question. Since the contract for the sale of the stock was the subject matter of the dispute, we have a distinctly different question than the one presented in the instant case. It is clear that under Sec. 8-317 of the Uniform Commercial Code, the Court

may issue equitable orders to protect the interests of the parties during the pendency of the litigation, and this would include injunctive orders dealing with any stock or other securities which are the subject matter of the litigation. It does not follow, however, that a court may go so far as to issue injunctive orders with regard to stock and securities which have no relation to the litigation. As a result, it is clear that *Fleming* is inapplicable to this case.

On the other hand, the Court of Appeals ignored the only decision directly on point. *Nederlandsche Handel-Maat-Schappij, N.V.* v. *Sentry Corporation*, 163 F. Supp. 800 (E.D. Pa. 1958). The question was squarely presented to the District Court in this case, wherein the plaintiff asked the Court to compel the defendant to bring shares of stock from other states into the district and place them in the hands of a United States Marshall for attachment under Pennsylvania law. The Court held that such an order was not authorized by existing Pennsylvania law,[8] nor was it authorized by Sec. 8-317 of the Uniform Commercial Code:

> The defendant asserts that the securities cannot be attached because they are without the geographical limits of this court and therefore beyond the jurisdiction and not subject to our decrees. With this we agree. It is well established that the basis for a writ of foreign attachment is the presence of property within the jurisdiction of the court. (Citations omitted).
>
> Since there appears to be no controversy over the allegation that the securities in question are in a place other than Pennsylvania, it is clear that this court lacks jurisdiction over them, and plaintiff's

[8] The Uniform Commercial Code provision of 8-317 is exactly the same in Pennsylvania as in Connecticut.

> motion for a preliminary injunction must fail. (*Supra* at 803).

The only other reported decisions interpreting Sec. 8-317 of the Uniform Commercial Code are not in any way contrary to the holding of the District Court in Pennsylvania. *Knapp* v. *McFarland*, 462 F.2d 935 (2d Cir. 1972) dealt with a sheriff's right to "poundage" in a case involving the effectiveness of a levy of execution on a stock certificate in the hands of a bank acting as custodian. Secondly, *Neifeld* v. *Steinberg*, 438 F.2d 423 (3d Cir. 1971) is in accord with the decision quoted above, even though decided on other grounds. In the course of the opinion, it was noted that a writ of foreign attachment which commenced the suit, which was served on a stockbroker holding some of the defendant's securities, was invalid by reason of the sheriff's failure to seize such securities. The Court pointed out the importance of manual seizure of the securities in order to effect a valid attachment. (*Supra* at 432).

It is also interesting to note that the Court of Appeals referred to the decision of the Fifth Circuit in *Frost* v. *Davis*, 288 F.2d 497 (5th Cir. 1961). However, in that case, the Court held that the stock must be physically seized in order to have a valid attachment, and went on to state:

> The requirement that the officer actually seize the certificate is something more than a procedural provision; it is a positive statutory provision against the attachment, levy or garnishment unless there is compliance with the act. (at 499).

(See also *Westerman* v. *Gilbert*, 119 F. Supp. 355 (D. R.I. 1953)).

As a result, we have a distinctly different manner of interpretation between the District Court of Pennsylvania

and the District Court in Connecticut, and insofar as *Neifeld* v. *Steinberg*, *supra*, is applicable, a conflict between the Third Circuit and the Fifth Circuit on one hand, and the Second Circuit on the other hand, in this important question of the application of the Uniform Commercial Code provision of 8-317 to the question of attachment.[9]

Finally, both the Court of Appeals and the District Court, as well as the District Court in the *Fleming* case, relied upon the citation of *Hodes* v. *Hodes*, 176 Ore. 102, 155, P.2d 564 (1945), which is set forth in Comment 2 of the Uniform Commercial Code. It is respectfully submitted that reliance upon *Hodes*, a post-judgment proceeding, is misplaced. In that case, a debtor-husband, who failed to pay support to his wife, was ordered to deliver certain stock in an Oregon corporation which he had concealed across the river in Washington, to an Oregon sheriff for levy of *execution*. It is clear from the decision that the particular nature of the case involving husband and wife was significant, and that all of the steps to perfect the attachment had been performed in Oregon, except seizure. Service had been made personall on the debtor-husband, and had been made on the offices of the corporation located in Oregon. Thus, there was jurisdiction in Oregon both over the person of the debtor-husband, and over the stock itself, since it was in an Oregon corporation. Finally, the stock represented part of the joint assets of the marriage, and therefore was subject to levy and equitable orders for that reason alone, quite apart from the Uniform Stock Transfer Act. In other words, once again, the stock was part of the subject matter of the dispute, and not totally extraneous to the matters in dispute in the litigation.

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[9] It should be noted, however, that *Frost* v. *Davis* was not interpreting 8-317 of the Uniform Commercial Code.

There is no claim in this case that the petitioner transferred stock out of the State of Connecticut or the United States to avoid litigation. There is no claim that any securities owned by the petitioner are in any way related to any issue in this litigation. There is no dispute as to the title of any of the petitioner's securities. The only relationship between the petitioner's securities and this litigation is the fact that the respondent wishes to secure its position by requiring the petitioner to bring into the jurisdiction securities which were never located in the State of Connecticut. It is respectfully submitted that the Court of Appeals and the District Court erred in issuing an order giving extra-territorial effect to a Connecticut statute.

B. The Court of Appeals failed to address itself to the question of the extra-territorial effect of the statute as applied by the District Court order.

The Court of Appeals did not address itself to the question of whether a defendant in litigation can be ordered to bring assets which had not been fraudulently concealed in any way into a state before a judgment is rendered. This is distinctly different from the routine attachment of assets within the jurisdiction. It is one thing for a person to voluntarily bring his assets into the jurisdiction, or to pay any judgments rendered against him. It is quite another to order him, in the prejudgment remedy situation, to deposit assets with the Court which are neither the subject matter of the dispute, nor in any way related to any issue in the litigation. Such an order gives an unfair advantage to a plaintiff prior to judgment. It is a startling proposition to think that the assets of an individual wherever located can be ordered into any court for the purpose of attachment, before there has been a full development or trial of the legal issues or merits of a case.

Indeed, in this case, we not only have an attempt to apply a Connecticut statute in states other than Connecticut, we have an attempt to apply a Connecticut statute outside of the territory of the United States. While in some instances, the Congress of the United States may have authority to exercise jurisdictional power on an extra-territorial basis (e.g. *Leasco Data Processing Equipment Corp.* v. *Maxwell*, 486 F.2d 1326 (2d Cir. 1972)), this is a power which has been narrowly applied and has never been applied in situations such as the instant one. (See: *Airline Stewards and Stewardesses Association* v. *TWA*, 273 F.2d 698 (2d Cir. 1959), *cert. denied*, 362 U.S. 988 (1960), 80 S.Ct. 1074, 4 L.Ed.2d 1031.

It is respectfully submitted that there is no authority for mandatory injunction directing a defendant to bring assets from outside of Connecticut into the state for attachment, and from outside of the United States into Connecticut for attachment. Such extra-territorial effect flies in the face of well established principles and should not be permitted.

C. The scope and extent of the order is violative of due process.

As stated above, it is extraordinary indeed to have a person ordered to bring assets into a jurisdiction, and thereby lose control over them, for the sole purpose of attachment in a prejudgment remedy application. As a result of the harsh effect of attachment and seizure statutes without an opportunity to be heard, this Court addressed itself to the problem of procedural due process in a series of cases. See *North Georgia Finishing, Inc.* v. *DiChem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975); *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 95 S.Ct. 1995, 40 L.Ed 2d 406 (1974); *Fuentes* v. *Shevin*,

407 U.S. 67, 92 S.Ct. 1983, 82 L.Ed. 556 (1972). As pointed out by the Court of Appeals, there was prior notice of the respondent's motion for prejudgment remedy and injunction, an opportunity to be heard in the District Court, and an opportunity for discovery. As a result, the Court of Appeals concluded that the action of the District Court in this regard complied with due process requirements as set forth in the cases above. However, it is respectfully submitted that application of the due process clause is not based upon a mechanical or artificial test as to the steps followed, but must be applied in relation to the particular litigation and the nature and scope of the order which is sought.

We are not making a claim that the procedural requirements of the Connecticut statute concerning prejudgment remedies were not met. Moreover, there is no claim that the mechanical steps needed to provide procedural due process were not met in this case. However, even though a statute may be valid in its scope, if it is applied in a manner which is inconsistent with due process as required by the Fourteenth Amendment to the United States Constitution, then it may be found to be invalid as applied. It is respectfully submitted that the nature and scope of the mandatory injunction order is in itself a denial of due process.

As we have previously pointed out, there are substantial defenses raised in this case, including matters by way of set-off and counterclaim. In view of the nature of the defenses raised by the petitioner, the magnitude of the dollar amounts involved, and the complicated legal and factual questions involved, the type and nature of the hearing on a prejudgment remedy application is inadequate as a matter of law. It is unreasonable to require a defendant to fully prove his defenses at a preliminary stage in a proceeding, within a short time after initiation of the suit, and prior to the use of discovery

techniques to develop the issues in the case. The effect of the attachment order in this case is to effectively and finally deprive the petitioner of the use and enjoyment of his property, without a meaningful hearing. *Sniadach* v. *Family Finance Corporation*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969). The due process standard must take into account the nature of the loss to the party whose property is being seized, the magnitude of the effect of an attachment order on the defendant, and the adequacy of a hearing which can be granted.

Secondly, we have an even more important due process question here. Fundamental principles of fairness and essential due process require that a defendant in a lawsuit not be required to bring his assets from anywhere in the world into a jurisdiction during the pendency of litigation. While it may be argued that a man should be responsible for his debts and obligations, it does not follow from this principle that he be required at a prejudgment stage to bring his assets from wherever they may be located to a particular jurisdiction for the mere convenience of a plaintiff in a lawsuit. Although the order in this case is limited to corporate shares of stock and other corporate securities, once this kind of attachment is justified, then it would appear that any kind of attachment for any purpose is justified.

The net effect of the Court order is to place the petitioner in a worse position than if judgment had been rendered against him after a full and fair trial on the merits. Pursuant to Sec. 52-367 of the Connecticut General Statutes (22a), the procedure for a levy of execution on corporate stock is substantially similar to that set forth in Sec. 52-289 for the attachment of stock. Stephenson, *op. cit.*, *supra*, Sec. 251; see *Winslow* v. *Fletcher*, *supra*. Under these circumstances, the attachment order of the District Court places the defendant in a substantially worse position than he would have been in if judgment

had been rendered against him after a trial on the merits. By what right is a plaintiff entitled to such an unfair advantage prior to judgment?

In applying the due process clause under the Fourteenth Amendment, this Court has in certain situations applied a standard based upon "traditional notions of fair play and substantial justice." *Milliken* v. *Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940). As a result, there is a long line of cases, beginning with *International Shoe Company* v. *Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and culminating in the recent decision in *Shaffer* v. *Heitner*, — U.S. —, 53 L.Ed. 2d 683 (1977). While these cases are not directly applicable, the basic principle enunciated in this series of cases would appear to be applicable to the facts of this case. In determining whether or not jurisdiction could be exercised, this Court, beginning with the *International Shoe* case, turned away from a mechanical or artificial evaluation of a defendant's activities in the forum state, to review the kind and quality of contact which the forum state has with a party in order to determine whether or not jurisdiction may properly be exercised. As noted in the *International Shoe* case:

> Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the focus of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contact, ties or relations. (*Supra* at 319).

In the instant action, we have *in personam* jurisdiction over the petitioner. He is a resident of Connecticut, and has been for a number of years. However, simply because there is *in personam* jurisdiction over a person

does not lead to a conclusion that the person may be ordered to deposit assets wherever located with the District Court in Connecticut for the sole purpose of attachment, consistently with the due process clause. This is especially true in a prejudgment remedy stage of a case. The *International Shoe Co.* test was recently applied by this Court in *Shaffer* v. *Heitner*, *supra*, in which Deleware asserted jurisdiction against non-resident corporate fiduciaries whose sole contact with the state was ownership of stock which was not related to the subject matter of the litigation, nor related to the underlying cause of action. Mr. Justice Marshall, in delivering the opinion of the Court, analyzed in considerable detail the nature of the due process test, both as to *in personam* and as to *in rem* and *quasi in rem* jurisdiction. It was concluded that the Delaware statute in question, basing jurisdiction *quasi in rem*, did not meet the minimum contacts test enunciated in *International Shoe Co.* and other cases, and thus the assertion of jurisdiction over the defendants in that case was "inconsistent with that constitutional limitation on state power." (53 L.Ed.2d at 703). The basic rationale of *Shaffer* v. *Heitner*, *supra*, and other similar decisions, is that there are limitations upon the exercise of jurisdiction over a person or property based upon the due process clause of the Fourteenth Amendment, which must not only take into account the procedures involved, but also "traditional notions of fair play and substantial justice", and the scope and effect of an order may not be "inconsistent with the basic values of our constitutional heritage." (53 L.Ed.2d at 705).

As a result, it is respectfully submitted that a prejudgment remedy attachment order which directs a defendant to bring assets into the jurisdiction which had never been located here for the sole purpose of permitting the attachment of those assets, is violative of those "traditional notions of fair play and substantial justice." Such an order is devastating on the person. There is no valid

basis for the conclusion that there has been any attempt to conceal assets or remove them from the jurisdiction of the Court. Moreover, there is no justification for the extension of jurisdiction, under the Connecticut prejudgment remedy procedure, to any assets wherever they may be located.

The nature and scope of the prejudgment remedy order of the Court is unconstitutional in its nature and violates the due process clause of the Fourteenth Amendment, and should be reversed.

CONCLUSION

For these reasons, it is respectfully submitted that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Attorney for Petitioner

APPENDICES

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 991—September Term, 1976.
(Argued May 26, 1977 Decided September 1, 1977.)

Docket No. 77-7026

INTER-REGIONAL FINANCIAL GROUP, INC.,
Plaintiff-Appellee,

v.

CYRUS HASHEMI,
Defendant-Appellant.

Before:

VAN GRAAFEILAND, *Circuit Judge,*
MEHRTENS * and PIERCE,** *District Judges.*

Appeal from an order entered in the District of Connecticut, Jon O. Newman, *Judge*, directing the defendant to bring certain stock certificates into the State of Connecticut and to surrender them to the clerk of the court to be attached.

Affirmed.

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* Of the Southern District of Florida, sitting by designation.

** Of the Southern District of New York, sitting by designation.

FRANK W. MURPHY, Esq., Norwalk, Conn. (Slavit, Connery & Vardamis, Norwalk, Conn., of counsel), *for Defendant-Appellant.*

PAUL E. KNAG, Esq., Stamford, Conn. (Cummings & Lockwood, Stamford, Conn., of counsel), *for Plaintiff-Appellee.*

PIERCE, *District Judge*:

This is an appeal from an order entered in the United States District Court for the District of Connecticut, Jon O. Newman, *Judge*, which granted plaintiff's motion for a prejudgment attachment and for an order directing the defendant to deliver into the custody of the clerk of the court certain stock certificates to be attached to secure a judgment sought in a breach of contract action. We affirm.

I.

Plaintiff, Inter-Regional Finance Group (Inter-Regional) commenced this diversity action to recover damages from the defendant, Cyrus Hashemi (Hashemi), for an alleged breach of an indemnity agreement. The complaint alleges that pursuant to a loan agreement dated November 28, 1975, Coronado Group, Ltd., a company of which Hashemi was then president, borrowed $250,000 from the Banque Scandinave en Suisse. The loan was secured by an irrevocable letter of credit, applied for and obtained by Inter-Regional from the First National Bank of St. Paul (First National). In its application for the letter of credit, Inter-Regional agreed to reimburse First National for any payments made pursuant to the letetr of credit.

The complaint further alleges that to secure performance by Coronado, Hashemi subsequently entered into an indemnity agreement with Inter-Regional whereby Hashemi was to reimburse Inter-Regional for any payments made to First National. On July 15, 1976, First National paid $250,000 to Banque Scandinave en Suisse under the letter of credit, and on the same date was reimbursed by Inter-Regional. It is alleged that Inter-Regional thereafter unsuccessfully sought indemnity from Hashemi.

The complaint filed in this action was accompanied by an application for a prejudgment remedy calling for the attachment of certain of Hashemi's personal property and an "injunction" requiring Hashemi to bring certain securities into the state for the purpose of attachment. Plaintiff sought an order to show cause, which was issued by Judge Zampano, with a temporary restraining order enjoining the defendant from transferring any of his securities. The application for the prejudgment remedy was referred to Judge Newman, who twice extended the restraining order and scheduled the matter for a prejudgment hearing pursuant to Conn. Gen. Stat. Ann. § 52-278d. After the hearing Judge Newman made a finding of "probable cause" that Inter-Regional would succeed on the merits and that plaintiff would suffer irreparable harm unless the order as sought by plaintiff was entered. Judge Newman thereafter issued an order on December 28, 1976 directing the defendant to surrender to the deputy clerk of the United States District Court in Bridgeport, Connecticut, certificates evidencing publicly traded, marketable securities owned by him, with an aggregate market value of $312,500, or, if the defendant did not own such publicly traded, marketable securities, he was directed to surrender privately traded securities or a combination of publicly and privately traded securities to be attached in

the manner authorized by the court. The defendant appeals from this order.

II.

As a general rule, orders granting, denying, continuing or vacating attachments are not reviewable either as final orders pursuant to 28 U.S.C. § 1291, interlocutory orders pursuant to 28 U.S.C. § 1292(a)(1) or, under the "collateral order" exception provided by *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949). See *W. T. Grant Co.* v. *Haines*, 531 F.2d 671, 678 (2d Cir. 1976); *Rosenfeldt* v. *Comprehensive Accounting Service, Corp.*, 514 F.2d 607, 610 (7th Cir. 1975) (Stevens, *J.*); *West* v. *Zurhorst*, 425 F.2d 919, 920 (2d Cir. 1970) (Friendly, *J.*). However, here the order of the district court required the defendant to do more than simply surrender the certificates to the custody of the clerk of the court to be attached. The defendant was first required to bring the certificates into the State of Connecticut from their locations in other states, and indeed, even in other countries. Since the transportation of the certificates into the state was a necessary step preceding the actual attachment, we find that the district court below and the parties correctly treated the December 28th order as an injunction.[1] Cf. *Rosenfeldt, supra* at 609. As such, it is appealable pursuant to 28 U.S.C. § 1292(a)(1).

[1] Although plaintiff-appellee argues on this appeal that the December 28th order is not an injunction and therefore not appealable, the papers submitted on plaintiff's behalf in the district court, not only contemplated the issuance of a mandatory injunction but specifically referred to the order sought as an "injunction".

III.

Having concluded that the order is an injunction and thus appealable, we turn to appellant's arguments that the district court did not have the authority under Connecticut law to direct him to bring securities into the state in aid of an attachment and that he was denied due process.

Rule 64 Fed.R.Civ.P. makes available to federal district courts all remedies providing for the seizure of property to secure satisfaction of judgment in the same manner as is provided by law of the state in which the court is sitting. Under Connecticut law, the prejudgment remedy of attachment is authorized by § 8-317 of the Uniform Commercial Code, Conn. Gen. Stat. Ann. § 42a-8-317.[2] Although this section requires that there be actual physical possession and control of the stock certificates by the sheriff before the attachment is perfected, see *Neifeld* v. *Steinberg*, 438 F.2d 423, 432 (3d Cir. 1971), subdivision (2) of the statute authorizes the court to issue an injunction in aid of the attachment which may take the form of a mandate requiring the defendant to bring the

[2] § 8-317 provides in relevant part:

(1) No attachment or levy upon a security or any share or other interest evidenced thereby which is outstanding shall be valid until the security is actually seized by the officer making the attachment or levy but a security which has been surrendered to the issuer may be attached or levied at the source.

(2) A creditor whose debtor is the owner of a security shall be entitled to such aid from courts of appropriate jurisdiction, by injunction or otherwise, in reaching such security or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process.

certificates into the state, as was done here, and to deliver them into the actual physical control and possession of the sheriff.[3] See *Fleming* v. *Gray Manufacturing Co.*, 32 F. Supp. 724, 726 (D. Conn. 1973); Cf. *Frost* v. *Davis*, 288 F.2d 497, 499 (5th Cir. 1961); *Wilson* v. *Columbia Casualty Co.*, 118 Ohio St. 319, 160 N.E. 906 (1928). But see, *Nederlandsche Handel-Maatshappij, N.V.* v. *Sentry Corp.*, 163 F. Supp. 800, 803 (E.D. Pa. 1958). Directly on point is the *Fleming* case which the court below relied upon as support for its interpretation of Connecticut law on prejudgment attachments. Further support is found in the Comment 2 of the Uniform Commercial Code, which is re-codified in the Connecticut statute. The citation of *Hodes* v. *Hodes*, 176 Or. 102, 155 F.2d 564 (1945) therein makes it evident that the drafters of the Code envisioned the exact procedure as was employed by the district court. In *Hodes*, the court in proceeding under the Code's precursor, the Uniform Stock Transfer Act, directed that a debtor-husband, who had failed to pay support, deliver certain stock located in another state to the Oregon sheriff. Moreover, it appears that even prior to *Hodes*, one Connecticut court issued a similar order to a defendant in order to facilitate the perfection of a prejudgment attachment. See *White* v. *Leary*, 6 Conn. Supp. 37 (1938). We find, therefore, that Judge Newman properly interpreted the Connecticut statute as authorizing the injunction issued.

[3] §52-289 Conn. Gen. Stat. Ann. also authorizes prejudgment attachments. However, this statute has long been interpreted as allowing a levy only upon stock of corporations incorporated in Connecticut under the now timeworn rationale that ownership in stock existed only at the situs of the corporation. See, *e.g.*, *Winslow* v. *Fletcher*, 53 Conn. 390, 4 A. 250 (1886). Appellant relies heavily upon this interpretation of the statute in support of his argument. However, Judge Newman specifically rejected the notion that § 52-289 had any application to the facts of the instant case since none of the companies involved were Connecticut corporations. Thus, we find this reliance by appellant to be misplaced.

Appellant's claim that he was denied procedural due process is without merit. He was afforded prior notice of plaintiff's motion for prejudgment remedy and an injunction, given an opportunity to be heard on the motion at a prejudgment hearing held in compliance with *Bell* v. *Burson*, 402 U.S. 535, 540 (1971), and provided with an opportunity for discovery. The actions of the district court in this regard complied with due process requirements. See *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972).

Thus, finding appellant's arguments to be without merit, we hold that the December 28th order issued by the district court met the requirements of Connecticut law with respect to prejudgment attachment.

Affirmed.

APPENDIX B

Opinion of the United States District Court

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil Action No. B-76-216

INTER-REGIONAL FINANCIAL GROUP, INC.,
Plaintiff,

v.

CYRUS HASHEMI,
Defendant.

INJUNCTION

This cause came on to be heard upon order to show cause on plaintiff's motion for an injunction and prejudgment remedy, and the court, having considered the complaint, the affidavits and deposition transcript submitted and, as to finding of fact number 10, the statements of defendant's counsel in his brief, makes the following findings of fact and conclusions of law:

FINDINGS OF FACTS

1. The defendant Cyrus Hashemi is a citizen of Iran, with his usual place of abode at 44 Arrowhead Way, Darien, Connecticut.

2. Plaintiff is a Delaware corporation whose principal offices are located in Minneapolis, Minnesota.

3. The amount in controversy herein exceeds the sum of $10,000 exclusive of interest and costs.

4. Plaintiff made application to the First National Bank of St. Paul on November 24, 1975 for a Letter of Credit to secure a loan made to Coronado Group, Ltd. by Banque Scandinave en Suisse. A copy of the application is attached to the complaint herein.

5. The Letter of Credit was issued by the First National Bank of St. Paul pursuant to plaintiff's application.

6. Defendant entered into a certain indemnity agreement with the plaintiff dated February 11, 1976, under which defendant agreed to indemnify and hold harmless plaintiff from any and all liabilities it might actually be called upon to pay by reason of, *inter alia*, its obligations under the application for the Letter of Credit dated November 24, 1975. A copy of the indemnity agreement is attached to the complaint herein.

7. On July 15, 1976, First National Bank of St. Paul paid $250,000 to Banque Scandinave en Suisse under the Letter of Credit and called upon plaintiff to reimburse it in said amount.

8. The plaintiff paid the First National Bank of St. Paul the sum of $250,000 on July 15, 1975 pursuant to its undertaking under the application to reimburse First National Bank of St. Paul for the amount paid on the Letter of Credit.

9. Defendant has made no payment to plaintiff despite plaintiff's demand that he do so.

10. All of the defendant's securities are located outside the State of Connecticut, and substantially all of them are outside the United States. (Defendant's Brief on Scope of Attachment Order, p. 2)

11. There is probable cause for plaintiff's claim that the defendant is indebted to the plaintiff in a sum in excess of $250,000 pursuant to said indemnity agreement attached to the complaint herein, and plaintiff will suffer irreparable injury unless an injunction in aid of said attachment issues as prayed by plaintiff.

CONCLUSION OF LAW

Pursuant to applicable Connecticut law and Rules 64 and 65 of the Federal Rules of Civil Procedure, plaintiff is entitled to a prejudgment remedy and injunction in aid thereof to secure the claim being made herein.

Upon said findings of fact and conclusion of law, it is hereby.

ORDERED, that defendant shall surrender to the Deputy Clerk of this Court in Bridgeport for attachment by the United States Marshal certificates evidencing publicly traded, marketable securities owned by him with an aggregate market value of $312,500, provided that if the defendant does not own publicly traded, marketable securities with an aggregate market value of not less than $312,500, he shall surrender to said Deputy Clerk all his publicly traded, marketable securities plus privately traded securities with an aggregate market value of not less than $500,000 minus 160% of the value of publicly traded securities surrendered; all such securities shall be endorsed in blank, to be attached in accordance with the attachment process authorized herein, and shall not be transferred pending further order of this Court, and it is further

ORDERED that in the first instance, the determination of value shall be made in good faith by the defendant; that the defendant shall furnish the plaintiff with all

documentation on which he relies for his determination of value and that in the event plaintiff contests such determination of value by the defendant, the issue may be presented to this Court for a determination by it, and it is further

ORDERED that surrender of the securities as aforesaid shall be effected on or before Jan. 14, 1977, and it is further

ORDERED that a writ of attachment and garnishment may issue to secure the sum of $300,000.

Dated this 20 day of Dec., 1976.

/s/ JON O. NEWMAN
JON O. NEWMAN
United States District Judge

APPENDIX C

Ruling on Application for Prejudgment Remedy

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. B-76-216

INTER-REGIONAL FINANCIAL GROUP, INC.

v.

CYRUS HASHEMI

Plaintiff seeks $250,000 in damages plus costs and attorney's fees for defendant's alleged breach of an indemnity agreement. Jurisdiction is based on diversity of citizenship. Plaintiff seeks a prejudgment remedy under Fed. R. Civ. P. 64 and § 52-278a of the Connecticut General Statutes to secure any judgment that may be entered. Since the assets of the defendant that are presently located in the state of Connecticut fall far short of the amount claimed in the suit, plaintiff asks that the Court enter an order enjoining the transfer of defendant's securities and requiring the defendant to bring his stock certificates, currently located in other states and countries, into the state of Connecticut, where they will become subject to the prejudgment remedy.

The complaint alleges that pursuant to a loan agreement dated November 28, 1975, Coronado Group, Ltd. borrowed $250,000 from Banque Scandinave en Suisse. The loan was secured by an irrevocable letter of credit issued by the First National Bank of St. Paul. The letter of credit had been obtained by the plaintiff for

Coronado. In plaintiff's application for the letter of credit, plaintiff agreed to reimburse First National Bank of St. Paul for any payments made under the letter of credit. Subsequently plaintiff and defendant entered into an indemnity agreement under which defendant agreed to indemnify and hold the plaintiff harmless from any and all liabilities it might be called upon to pay by reason of its obligations under the application for the letter of credit. On July 15, 1976, First National Bank of St. Paul paid $250,000 to Banque Scandinave en Suisse under the letter of credit, and on the same date the plaintiff reimbursed the St. Paul bank. Plaintiff demanded indemnification from the defendant under the indemnity agreement, but the defendant has made no payment.

The defendant admits the execution of the agreement but interposes certain affirmative defenses and counterclaims. He asserts that the plaintiff's representatives on the Coronado Board of Directors breached their fiduciary duty to Coronado and that plaintiff, rather than defendant, breached the agreement. He cites the plaintiff's failure to pay the interest on the note to put off the date when the note would be called due, and imputes to the plaintiff an intention to force Coronado into liquidation to the detriment of Coronado and defendant as minority stockholder in Coronado.

Under § 52-278d of the Connecticut prejudgment remedy statute the defendant has the right to a hearing on whether or not there is probable cause to sustain the validity of the plaintiff's claim. This hearing has been held, and the parties have had a full opportunity to brief the issues.

The Connecticut probable cause standard on a prejudgment remedy hearing is no higher than the "reasonable grounds to believe" standard of probable cause in the context of criminal law. It is not necessary at this stage to predict the outcome. *Long* v. *Abbott Mortgage Corp.*, Civil No. N-74-133 (D. Conn. Apr. 28, 1975). This probable cause standard is met in the present case. The indemnity agreement clearly sets forth the defendant's obligations. The exhibits and affidavit of Robert Fischer support the allegations of the complaint that these obligations were triggered when the plaintiff made its payment to the St. Paul bank and that the defendant breached its obligations by failing to reimburse the plaintiff. While it is possible that defendant will succeed in defeating plaintiff's claim at trial, the probable validity of the claim is sufficiently shown at this stage.

The defendant argues that the probable cause necessary for a prejudgment remedy is undermined by the existence of defenses and counterclaims which might ultimately defeat plaintiff's claims or drastically diminish the amount of recovery or even entitle defendant to recover from the plaintiff. The mere assertion of such defenses and counterclaims will not deprive plaintiff of its right to a prejudgment remedy once it has established probable cause. Perhaps, on a record quite different from the present one, a defense might be so strong as to make meaningless the otherwise-established probable cause. A statute of limitations operating to bar a claim might be an example. In the present case, however, while the defenses may be established at trial, they do not appear on the present record to be so certain as to bar the plaintiff from obtaining security while the issues are litigated. It is significant that plaintiff has submitted affidavits in support of its claim while the defendant's

own claims remain unsubstantiated apart from the allegations of the pleadings and the arguments of counsel.

Nor can the defendant's counterclaim seeking $300,000 in damages plus ancillary relief deprive the plaintiff of a prejudgment remedy. The Court has considerable latitude under Fed. R. Civ. P. 13 to treat these counterclaims separately from the plaintiff's claims. Although defendant might prefer that the Court treat the plaintiff's claims and the defendant's counterclaims as canceling each other out at the prejudgment stage, it seems preferable to grant plaintiff its remedy once it establishes probable cause on its own claims and allow defendant to proceed independently for his own prejudgment if he can make a similar showing.

The entry of a prejudgment remedy is therefore appropriate. The only remaining question is whether the Court can require the defendant to bring into the state of Connecticut the stock certificates presently located outside the jurisdiction. It is acknowledged that these stock certificates evidence shares in out-of-state corporations, and thus § 52-289, regulating attachment of corporate rights or shares, is inapplicable since that section has been construed to apply only to shares of stock in domestic corporations. *Winslow* v. *Fletcher*, 53 Conn. 390 (1885).

Attachment and levy upon shares of stock in all corporations, including corporations not incorporated in the state of Connecticut, are now governed by § 8-317 of the Uniform Commercial Code, Conn. Gen. Stat. § 42a-8-317. That section provides that no attachment or levy upon a security is valid until the security is actually seized by the officer making the attachment. To deal with the problem of securities that are not readily accessible to

physical seizure, § 8-317(2) provides that a creditor "shall be entitled to such aid from courts of appropriate jurisdiction, *by injunction or otherwise*, in reaching such security or in satisfying the claim by means thereof *as is allowed at law or in equity* in regard to property which cannot readily be attached or levied upon by ordinary legal process." (Emphasis added). Clearly this Court could use its injunctive powers to require the defendant to deliver up the securities if they were located within the state. And, although enforcement considerations become somewhat more problematic when the securities are located out-of-state,[1] the authority of the Court to enter an order of the sort requested by the plaintiff has already been established in the District of Connecticut. *Fleming* v. *Gray Mfg. Co.*, 352 F. Supp. 724 (D. Conn. 1973). In *Fleming* the plaintiffs sought to attach certain securities located outside the state of Connecticut. They requested an order enjoining the defendants from transferring the securities and requiring them to deliver the share certificates to the Court. This relief was granted, with the exception that where the defendant owned shares in certain subsidiaries which then in turn owned shares in still other corporations, and where only some of the first level of subsidiaries were subject to the jurisdiction of the Court, the Court held that the injunction could reach only those parties actually before the Court. Thus the only way in which the Court's order fell short of the requested relief in that case was that the subsidiaries not subject to the Court's jurisdiction were not enjoined from transferring the stock they owned nor required to deliver the certificates to the Court.

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[1] The Court's contempt power, of course, is always available.

On the basis of the *Fleming* case, the type of prejudgment remedy including an injunction sought by the plaintiff is granted. The injunction against transfer of securities and requiring defendant to bring certificates evidencing his securities into the jurisdiction will be granted only to the extent reasonably necessary to secure the amount prayed for in the complaint. Publicly traded securities with a value of 125% of the *ad damnum* or privately traded securities with a value of 200% of the *ad damnum* will be deemed sufficient security. A revised form of the proposed order may be submitted.

Dated at New Haven, Connecticut, this 28th day of October, 1976.

/s/ Jon O. Newman
Jon O. Newman
United States District Judge

APPENDIX D

Ruling on Motion for Reargument

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. B-76-216

INTER-REGIONAL FINANCIAL GROUP, INC.

v.

CYRUS HASHEMI

On October 28, 1976, this Court granted plaintiff's application for a prejudgment remedy. The ruling provided in part for defendant to bring into the District of Connecticut securities now held outside the jurisdiction in an amount sufficient to secure the sum of $300,000. An injunction implementing that ruling was entered on December 28, 1976. The date for compliance was January 14, 1977. Defendant took an appeal from that order and has now moved to reargue in this Court.[1]

[1] At the time the motion for reargument was filed, defendant was not in compliance with the Court's order, and a motion for contempt filed by the plaintiff was pending. At the time of the show cause hearing on the contempt motion, the Court indicated to the defendant that it would take no action on his motion to reargue unless and until he took steps toward compliance. Recent communications from the defendant and his counsel show that such steps are being taken. While full compliance has not yet occurred, a ruling on the motion for reargument is now appropriate.

The prejudgment remedy in this case was entered largely on the authority of *Fleming* v. *Gray Mfg. Co.*, 352 F. Supp. 724 (D. Conn. 1973), a prior decision of this District, from which no appeal was taken. Neither the United States Court of Appeals for the Second Circuit nor the Connecticut Supreme Court has authoritatively spoken on the issue of the authority of a trial court at the prejudgment stage to order a defendant over whom the court has personal jurisdiction to bring into the jurisdiction assets held outside the court's territorial jurisdiction. The *Fleming* case supports the order entered, but there is other authority to the contrary. See *Nederlandsche Handel-Maat-Schappij, N.V.* v. *Sentry Corp.*, 163 F. Supp. 800 (E.D. Pa. 1958). The defendant raises serious questions going to the power of the Court to issue such an order. These questions deserve authoritative resolution.[2]

The matter is on appeal to the Second Circuit at the present time, and this Court lacks jurisdiction to modify its order. Even if jurisdiction were re-acquired and, upon reargument, the order were vacated, the plaintiff would undoubtedly seek to appeal. Since defendant's appeal has been scheduled for briefing and argument by

[2] While this Court felt obliged to follow *Fleming* as the law of this District, were the question open, I would have questioned whether the Uniform Commercial Code provision relied on in *Fleming*, Conn. Gen. Stat. § 42a-8-317(2), was dispositive. That provision clearly permits a court with *in personam* jurisdiction over a defendant to require that defendant to bring his securities into the jurisdiction when the lawsuit seeks to determine ownership of the shares and perhaps other interests in the shares as well. But it is far less certain whether that provision authorizes a prejudgment remedy to bring shares into the jurisdiction solely to secure a judgment yet to be entered in a suit unrelated to determining stock interests.

the Court of Appeals, the only effect of granting the motion to reargue would be to delay the time of ultimate resolution of the issue.

Accordingly, the motion for reargument is denied.

Dated at New Haven, Connecticut, this 12 day of April, 1977.

/s/ Jon O. Newman
Jon O. Newman
United States District Judge

APPENDIX E

Excerpts From Relevant Connecticut Statutes

§ 52-289. Attachment of corporate rights or shares

Rights or shares in the stock of any corporation, together with the dividends and profits due and growing due thereon, may be attached and taken on execution. Such attachment shall be made by leaving a true and attested copy of the process and of the accompanying complaint, with the proper endorsement thereon of the officer serving the same, with the defendant or at his usual place of abode, if within the state, and with the secretary, clerk or cashier of such corporation or, if such corporation has no secretary, clerk or cashier or if he is absent from the state, then at the principal place in the state where such corporation transacts its business or exercises its corporate powers. When an officer with a writ of attachment applies to such secretary, clerk or cashier, for the purpose of attaching such rights or shares, the secretary, clerk or cashier shall furnish him with a certificate, under his hand, in his official capacity, specifying the number of rights or shares which the defendant holds in the stock of such corporation, with the encumbrances thereon, if any, and the amount of dividends thereon due, and upon the failure of any secretary, clerk or cashier to furnish such officer with such certificate, he shall be fined not more than two hundred dollars. Such rights or shares, together with the dividends and profits, shall be held to respond to the judgment which may be recovered in such action for sixty days after its rendition; but no attachment of shares of stock for which a certificate is outstanding shall be valid until such certificate is actually seized by the officer making the attachment, or is surrendered to the corporation which issued it. (1949 Rev., § 8031; 1959, P.A. 574, § 5.)

§ 42a-8-317. Attachment or levy upon security

(1) No attachment or levy upon a security or any share or other interest evidenced thereby which is outstanding shall be valid until the security is actually seized by the officer making the attachment or levy but a security which has been surrendered to the issuer may be attached or levied at the source.

(2) A creditor whose debtor is the owner of a security shall be entitled to such aid from courts of appropriate jurisdiction, by injunction or otherwise, in reaching such security or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process. (1959, P.A. 133, § 8-317, effective Oct. 1, 1961.)

§ 52-367. Levy on corporate stock

The levy of an execution on the rights or shares which any person owns in the stock of any corporation, together with the interest, dividends and profits, due and growing due thereon, shall be by leaving a true and attested copy thereof with the secretary, clerk or cashier, with an attested certificate, by the officer making such levy, that he levies upon such rights or shares to satisfy such execution; but when any bank incorporated by this state, or any banking association located and transacting business in this state, has no cashier or the cashier is absent therefrom, or any other corporation incorporated under the laws of this state has no secretary or clerk therein, the officer shall leave the copy of the execution, and the certificate in this section prescribed, at the principal house or place in this state where such corporation transacts

its business or exercises its corporate powers. When any proper officer, with a writ of execution, applies to such secretary, clerk or cashier, for the purpose of so levying upon such rights or shares, the secretary, clerk or cashier shall furnish him with a certificate under his hand, in his official capacity, stating the number of rights or shares the defendant holds in the stock of such corporation, with the encumbrances thereon, if any, and the amount of dividends thereon due. Thereupon such officer shall, as in other cases, post and sell the same, together with such interest, dividends and profits, or such part thereof as is sufficient to satisfy such execution; and shall give to the purchaser a written conveyance of such rights or shares; and shall also leave with such secretary, clerk or cashier a true and attested copy of the execution and of his return thereon; and the purchaser shall thereupon be entitled to all dividends and stock, and to the same privileges as a member of such corporation as such debtor was entitled to; but no levy upon shares of stock for which a certificate is outstanding shall be valid until such certificate is actually seized by the officer making the levy, or is surrendered to the corporation which issued it. (1949 Rev., § 8110; 1959, P.A. 574, § 6.)

APPENDIX F

(A portion of the testimony of Cyrus Hashemi before the Hon. Jon O. Newman, on February 23, 1977)

CYRUS HASHEMI, called as a witness, having been first duly sworn by the Clerk, testified as follows:

The Clerk: State your name and address.

The Witness: Cyrus Hashemi, 44 Arrowhead Way, Darien, Connecticut.

Direct Examination by Mr. Murphy:

Q. Mr. Hashemi, do you own any publicly-owned traded marketable stocks or bonds? A. I do.

Q. And can you give us an approximate value of those stocks and bonds at market at the present time? A. I believe the approximate value is about 60 or 62 thousand dollars.

Q. Are those bonds located in the—stocks or bonds located in the State of Connecticut? A. No, they are not.

Q. Have they ever been located in the State of Connecticut? A. No.

Q. Are they located in the United States? A. No, they are not.

Q. Have they ever since you have been the owner of any of them been located in the United States? A. No.

Q. Do you have them physically in your possession right now? A. No.

Q Are they held in some type of management account? A. They are.

Q. Do you have a present up-to-date accounting as to the management status of that account? A. I don't, but I could ask for one.

The Court: Are these securities available to you on your demand?

The Witness: They are in a management account, your Honor, and that would mean that I would have to physically demand their release to me and when I do, they release them.

The Court: All right. When you say physically you don't mean in person, do you?

The Witness: Yes, sir, your Honor.

The Court: They would honor your cabled instructions?

The Witness: No, your Honor, because my signature is there and I have to sign there in person. It's a management account. I can certainly have a power of attorney drawn and get someone else to do. I can do that, too.

The Court: Is there someone at the location of these securities who you could authorize to do that?

The Witness: Someone with the management company or——

The Court: In that city. I don't want to have you unnecessarily incur the expense of flying to wherever these are. Is there a law firm or some official who you could authorize?

The Witness: It's very difficult to do that. I would have to send somebody from here or go myself, but I am prepared to do that.

Appendix F—(A portion of the testimony of Cyrus Hashemi before the Hon. Jon O. Newman, on February 23, 1977)

Your Honor, may I also say that I have submitted to the Court of Appeals this proposal about three weeks ago to the effect that I was prepared to have these securities brought into the country and posted and I believe in that letter I also said that I was prepared to sign an affidavit to the effect that I did not—I do not own more than this amount of publicly traded securities.

The Court: All right.

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-778

CYRUS HASHEMI,

Petitioner,

vs.

INTER-REGIONAL FINANCIAL GROUP, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO: THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The respondent, Inter-Regional Financial Group, Inc., respectfully prays that the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit rendered in these proceedings on September 1, 1977, be denied.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, dated September 1, 1977, appears at Appendix A to the Petition, p.1a, and is reported at 562 F. 2d 162. The order of the United States District Court for the District of Connecticut, dated December 28, 1976, is unreported and appears at .

Appendix B to the Petition, p. 8a. The order of the District Court is based upon the opinion of the Honorable Jon O. Newman, Judge of the District Court, dated October 28, 1976, which is unreported, and appears at Appendix C to the Petition, p.12a. Finally, the opinion of Judge Newman denying the petitioner's motion for reargument, dated April 12, 1977, similarly unreported, appears at Appendix D to the Petition, p.18a.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on September 1, 1977 (Appendix A to the Petition, p.1a), and the jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). However, the Petition was not filed until December 1, 1977, more than ninety days after the rendition of the judgment of the United States Court of Appeals for the Second Circuit. Accordingly, the Petition is not timely, and therefore "must . . . be denied for want of jurisdiction." *Department of Banking* v. *Pink*, 317 U.S. 264, 268 (1942).

Statutes Involved

The petitioner identifies Conn. Gen. Stat. §§52-278a-52-278m, 52-289, and 42a-8-317 as the Connecticut Statutes which he wishes this Court to interpret in this case.

Respondent would further identify two other Connecticut Statutes relating to attachments, Conn. Gen. Stat. §§52-279 and 52-280, as authority for the action taken by the District Court.

Statement of the Case

This is an action by the plaintiff-respondent against the defendant-petitioner for $250,000 plus interest and

attorneys' fees, which are due respondent from petitioner under an Indemnity and Guaranty Agreement.

In order to procure a $250,000 loan for Coronado Group Ltd. ("Coronado") from Banque Scandinave en Suisse, respondent, a stockholder of Coronado, obtained a $250,000 letter of credit from First National Bank of St. Paul, as security for said loan. (Appendix B to Petition, p.9a). Under respondent's application for said letter of credit, respondent agreed to reimburse First National Bank of St. Paul for any payments made under the letter of credit. (*Id.*)

In turn, under the Indemnity and Guaranty Agreement, petitioner, who was then the president of Coronado, agreed to indemnify and hold respondent harmless for all sums which respondent might be called upon to pay as a result of this transaction. (*Id.*)

On July 15, 1976, First National Bank of St. Paul paid $250,000 to Banque Scandinave en Suisse under the letter of credit, and on the same day, respondent reimbursed the First National Bank of St. Paul. (*Id.*)

However, petitioner failed to reimburse respondent. (*Id.*)

Accordingly, this suit was instituted and an attachment was sought.

Annexed to the application for attachment order was a financial statement which petitioner, an Iranian citizen living in Connecticut, had previously supplied to respondent. This statement, dated as of December 31, 1973, shows petitioner's total personal *net* worth as over $2.8 million, including, *inter alia*, over $2 million in securities, as well as real estate holdings in Paris, Switzerland and Connecticut, and substantial cash on deposit in the Banque Scandinave en Suisse.

However, in the course of the proceedings concerning the request for the attachment, petitioner advised the court that all of his securities were located outside the State of Connecticut. (*See* Appendix B to Petition, p. 9a). Also, deposition testimony elicited admissions from the petitioner that he had transferred title to his Connecticut home to his wife and claimed not to own any of the personal property located at his Connecticut house except his late model Mercedes-Benz automobile with respect to which his ownership is a matter of public record. In fact, at his deposition, he went so far as to state that, as to his clothing, he had "to ask her permission to wear it".

After a hearing, and after the petitioner was given an opportunity both to develop deposition evidence to support his opposition to the request for an attachment and to submit three separate briefs in support of his position, petitioner chose not to contest the basic facts giving rise to liability as set forth in the Complaint, but instead, without submitting any supporting affidavit, suggested certain defenses or counterclaims which he indicated he would interpose in this case.

Based on the evidence submitted, Judge Newman made a finding of facts confirming the allegations of the Complaint, granted respondent's application for attachment and ordered petitioner to post securities for attachment in Connecticut to secure any judgment which may be rendered against him in this action.

Petitioner then filed a purported notice of appeal from this order and moved in the District Court for a stay of the attachment order pending appeal. On January 10, 1977, Judge Newman granted the motion for

stay, on condition that the petitioner post a bond in the sum of $150,000. Instead of complying with this condition, the petitioner then filed a motion for stay with the Court of Appeals. That court then denied that motion for stay by order dated January 27, 1977.

Because petitioner nevertheless failed to comply with the District Court's order, and because petitioner failed to post the bond necessary to obtain a stay under the District Court order, respondent sought to have the petitioner held in contempt.

Petitioner failed to appear, as ordered, for an initial hearing on the contempt motion, but after being threatened with sanctions, did appear at a subsequent hearing and promised to comply with the order.

Nevertheless, to date, petitioner has failed to post any securities for attachment.

ARGUMENT

I. This Court Lacks Jurisdiction to Grant Certiorari In This Case Because the Petition Was Not Timely Filed

As noted above, because the Petition was not timely filed, this Court lacks jurisdiction to issue a Writ of Certiorari in this case.

II. The Interlocutory Nature of the Judgment Below Militates Against a Grant of Certiorari

This court has long recognized that it "should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of

the cause". *American Construction Company* v. *Jacksonville, T. & K. R. Co.*, 148 U.S. 372, 384 (1893). *See also Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916).

Here, no such considerations are present for, as the Seventh Circuit noted in discussing Court of Appeals jurisdiction in the context of an order granting a provisional remedy of the sort here involved:

> "[T]he rights of the party subject to the writ of attachment [are] preserved and protected while the litigation of the main cause of action presumably proceed[s] to a final determination, at which time a review of all orders of the district court would [be] proper." *United States for the use and benefit of Hi-way Electric Co.* v. *The Home Indemnity Company*, 549 F.2d 10, 12 (7th Cir. 1977).

See also Swift & Co. Packers v. *Compania Colombiana del Caribe, S.A.*, 339 U.S. 684, 689 (1950).

In fact, if a Writ of Certiorari were granted in this case, there might well be a trial on the merits in the District Court before this Court could hear argument and render its decision.

Hence, it would be inappropriate for this Court to grant a Writ of Certiorari in this case.

III. Certiorari is Inappropriate Because the Thrust of the Petition is to Seek Review of the Interpretation of Connecticut Law Adopted by the Courts Below

It is this Court's normal practice not to "reexamine the local law as applied by the lower courts." *Skelly Oil Co.* v. *Phillips Co.*, 339 U.S. 667, 674 (1950); *Accord, e.g., MacGregor* v. *State Mutual Life Assurance Co.*, 315 U.S. 280 (1942); *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701, 707-708 (1949). Indeed, this Court has recently noted several times that where the Court of Appeals and the District Court have concurred on an issue of local law:

> "this Court has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state law issue without such guidance might have justified a different conclusion."

Bishop v. *Wood*, 426 U.S. 341, 346 (1976); *see also*, *Id.* at n.10 and cases cited; *Tully* v. *Griffin*, 429 U.S. 68, 75 (1976); *Runyon* v. *McCrary*, 427 U.S. 160, 181 (1976).

Thus, where, as here, the thrust of petitioner's claims involves the interpretation of local law, as reasonably construed by the courts below, it is inappropriate to grant a Writ of Certiorari. *See Hinkle* v. *New England Mutual Ins. Co.*, 358 U.S. 65 (1958).

IV. The Decisions of the Courts Below Are Proper and Consistent With Pertinent Case Law

A. Connecticut Law.

The basic authority for the order entered herein is Conn. Gen. Stat. §52-279, which provides that:

> "Attachments may be granted upon all complaints containing a money demand against the estate of the defendant, both real and personal. . . ."

Under the authority of this statute, Connecticut courts have long recognized "that all the property of a debtor should be holden for the payment of the debts

of its owner", *Smith* v. *Gilbert*, 71 Conn. 149, 154, 41 A. 284 (1898), and that the right of attachment extends to property of every sort and description:

> "When an interest which may be strictly neither goods nor land is nevertheless clearly property, capable of being fairly sold and appraised, which is subject to the debtor's control, and which ought to be responsible for his debts, we say that the policy of the State for two hundred and fifty years clearly indicates that such interest is attachable property within the meaning of the statute." 71 Conn. at 155.

Furthermore, as §52-279 indicates, an attachment is available to secure a claim for money damages, and is not a device to aid an action to determine an interest in specific property. *See, Atlas Garage & Custom Builders, Inc.* v. *Hurley*, 167 Conn. 248, 258, 355 A.2d 286, 291 (1974).

Under the nineteenth century concept which viewed stock as separate from the stock certificate, early Connecticut courts may have thought themselves to be without power to attach stock in foreign corporations, at least where, as in *Winslow* v. *Fletcher*, 53 Conn. 390, 4 A. 250 (1886) and *Barber* v. *Morgan*, 84 Conn. 618, 80 A. 791 (1911), two cases relied on by petitioner, the court was proceeding *quasi - in - rem*, without *in personam* jurisdiction.

However, this concept was discarded in Connecticut with the enactment of the Uniform Stock Transfer Act, Sections 13 and 14 (the predecessors of Section 8-317 of the Uniform Commercial Code). As one court noted:

> "[T]he Uniform Stock Transfer Act has imparted such added value to the certificate, by increasing its negotiability, that the certificate is property within the meaning of attachment statutes and, having been merged, is considered to be the stock itself. Consequently, for the purposes of attachment, the situs of shares of stock is the place where the certificate is located." *Westerman* v. *Gilbert*, 119 F. Supp. 355, 358 (D. R.I. 1953).

Conn. Gen. Stat. §42a-8-317 (Section 8-317 of the Uniform Commercial Code) continues to recognize this principle. As comment 1 to this section states:

> "In dealing with investment securities the instrument itself is the vital thing . . . ."

Thus, under present law, the certificates evidencing securities of foreign corporations are property which can be attached under the general authority of Conn. Gen. Stat. §52-279, which, as noted above, has been construed to authorize attachment of all types of property.

The method for attachment of such securities is by seizure pursuant to Conn. Gen. Stat. §52-280, as facilitated by Conn. Gen. Stat. §42a-8-317(2), which provides that:

> "A creditor whose debtor is the owner of a security shall be entitled to such aid from courts of appropriate jurisdiction, by injunction or otherwise, in reaching such security or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process."

Thus, under §42a-8-317(2), where the court has *in personam* jurisdiction, it can order a defendant to produce his securities endorsed in blank, thereby permitting effective attachment of such securities in Connecticut, regardless of their physical location at the time the order is entered and regardless of whether the issuer is a domestic corporation whose shares are attachable under the procedure set forth under Conn. Gen. Stat. §52-289.*

Petitioner claims, however, that Conn. Gen. Stat. §42a-8-317 does not itself authorize *in personam* relief in aid of attachment, and that there is no authority for

* As both the District Court and the Court of Appeal- recognized, Section 52-289 of the Connecticut General Statutes provides a special procedure for attachment of shares issued by domestic (Connecticut) corporations. Where applicable, it is a useful tool in that it provides a method by which a court, without having *in personam* jurisdiction over a defendant, can acquire jurisdiction over his securities, provided the certificates can be seized in Connecticut. After judgment, such securities can then be levied upon and transferred to the purchaser at the sheriff's sale by action of the corporation without the necessity of requiring the defendant to endorse the securities in blank [*cf. Jack London Pro., Inc.* v. *Samuel Bronston Pro., Inc.*, 22 A.D.2d 870, 254 N.Y.S. 2d 397, 398 (1st Dept. 1964)] or otherwise to take any action personally. *See* Conn. Gen. Stat. §52-367. Obviously, these provisions are particularly significant where, as in *Winslow* v. *Fletcher*, 53 Conn. 390, 4 A. 250 (1886) and *Barber* v. *Morgan*, 84 Conn. 618, 80 A. 791 (1911), two cases relied on by petitioner, the court has no *in personam* jurisdiction and is proceeding on a *quasi-in-rem* basis. However, they do not preclude attachment of other securities under Conn. Gen. Stat. §§52-279, 52-280 and 42a-8-317.

an *in personam* attachment order under Connecticut law. In support of this claim, petitioner cites I Stephenson, *Connecticut Civil Procedure*, pp. 269-270. However, the fact is that at the pages cited in the Petition, Prof. Stephenson states:

> " . . . The commercial code provides that the attaching creditor is entitled to such aid as the state otherwise provides in obtaining possession of the certificate. This provision does not authorize such aid but merely confirms existing state practice, if any, which makes it available. *While there seems to be no Connecticut law on the point, it is 'the settled policy of this State, that all the property of a debtor shall be holden for the payment of the debts of its owner' and the court should show no hesitancy in granting a creditor's bill to implement that policy.*" (Emphasis added.)

Elsewhere in his treatise, Stephenson notes specifically that there is authority that stock in foreign corporations can be reached by such a "creditor's bill" and that, under Connecticut law, such a bill is available either before or after judgment. II Stephenson, *Connecticut Civil Procedure*, pp. 959-960.

Furthermore, in stating that "there seems to be no Connecticut law on the point", Stephenson has overlooked applicable case law authorizing an *in personam* order to facilitate an attachment of securities. *See, e.g.*, *White* v. *Leary*, 6 Conn. Sup. 37 (1938) and *Fleming* v. *Gray Manufacturing Co.*, 352 F. Supp. 724, 726 (D. Conn. 1973).

In particular, as noted above, *Fleming* v. *Gray Manufactuing Co., supra,* 352 F. Supp. 724 (D. Conn. 1973) constitutes direct precedent for the order herein. The relief in *Fleming,* as here, was an attachment order directing the defendants, *inter alia,* "to deposit with [the] Court" certain foreign securities located outside the state, and unrelated to the transaction giving rise to the debt in question, in order to "secure [that] debt". 352 F. Supp. at 725. Petitioner's claim that it was something different is inaccurate.

In any event, contrary to the claim that Conn. Gen. Stat. §42a-8-317 does not itself authorize relief in aid of attachment, comment 1 thereto makes clear that the right to appropriate "relief is provided in subsection (2)" itself. The proviso in §42a-8-317(2) limiting equitable relief to such circumstances "as is allowed . . . in equity" merely limits the availability of such *in personam* relief, pursuant to familiar common law principles, to situations where ordinary legal process is inadequate and the relief is necessary to complete the plaintiff's prejudgment remedy. *See White* v. *Leary, supra,* 6 Conn. Sup. 37 (1938).

There can be no question that such circumstances are present here, since petitioner has advised that all of his securities are located outside of the State of Connecticut. (Appendix B to the Petition, p. 9a). As such, without the order which was entered, they would be beyond the reach of ordinary legal process.

The fact that these securities are located beyond the jurisdiction does not mean that the court is powerless to reach them. On the contrary, where a court has *in personam* jurisdiction -- as it clearly does here -- it has the power to enter an appropriate order requiring the

defendant to take action with respect to property located outside of the state in order to facilitate an attachment or levy to secure or satisfy a claim for money damages. *See, e.g., Fleming* v. *Gray Manufacturing Co.. supra,* 352 F. Supp. 724 (D. Conn. 1973) [defendant owning securities in foreign corporations, the certificates of which were located outside of the state, ordered to deposit them with the court in order to secure a claim for money damages]; *Hodes* v. *Hodes,* 176 Or. 102, 155 P.2d 564 (1945) [the method used by the court in this case, where a debtor was ordered to deliver stock certificates located in Washington state to a sheriff in Oregon, is cited by official comment 1 to §42a-8-317 as "a method of reaching the security approved by the section"]; *Wilson* v. *Columbia Casualty Company,* 118 Oh. St. 319, 160 N.E. 906 (1928) [debtor may be required to bring property into state to answer for his debts]; *U.S.* v. *First Nat. City Bank,* 379 U.S. 378, 380, 384 (1965) [order entered in connection with jeopardy assessment under Internal Revenue Code against Uruguayan corporation held to reach assets located at defendant's foreign branch]; Restatement of Conflicts, §64 (2d Ed. 1969). Indeed, Connecticut has gone so far as to sanction a decree of foreclosure of real property located outside of the state but owned by a defendant over whom *in personam* jurisdiction has been obtained. *Mead* v. *N. York, Housatonic & Northern R.R. Co.,* 45 Conn. 199, 223 (1877).

The exercise of the court's equitable powers was particularly appropriate here, since unless petitioner's assets can be reached in Connecticut, the petitioner will be able to confront the respondent with the prospect that any judgment herein would have to be enforced by multiple lawsuits in multiple countries

around the globe without the benefit of the full faith and credit clause of the U.S. Constitution.

Since the assets of ordinary Connecticut citizens are readily subject to attachment in any case in which a money judgment is sought, provided probable cause can be established after due notice and hearing, it is only equitable that those who choose to lodge their assets at Swiss banks and other foreign locations should be equally subject to the state's attachment process.

Thus, it is respondent's contention that Connecticut law permits the relief which was granted in this case, and that such relief is in accord with the interests of justice.

Petitioner cites three federal court decisions which he claims are contrary to the decision of the Court of Appeals in this case. *Neifeld* v. *Steinberg*, 438 F.2d 423 (3rd Cir. 1971) [interpreting Pennsylvania law]; *Frost* v. *Davis*, 288 F.2d 497 (5th Cir. 1961) [interpreting Texas law]; *Nederlandsche Handel-Maatschappij, N.V.* v. *Sentry Corp.*, 163 F. Supp. 800 (E.D. Pa.1958) [interpreting Pennsylvania law].

In fact, however, none of these cases are in conflict with the instant decision, since this case involves Connecticut law, and the decisions cited involve the law of other states, a fact which is pointed up by the petitioner's decision to omit the citations of Pennsylvania authority relied on by the *Nederlandsche* court in the quotation which appears on p. 14 of the Petition.

Furthermore, neither *Neifeld* nor *Frost* involves an order directed to securities located outside the state. These cases do recognize that manual seizure is a prerequisite to attachment of corporate securities under

the Code, but this is in no way inconsistent with the order herein, which contemplates that such manual seizure will occur as a result of the mandatory injunction entered herein. Hence, the Court of Appeals herein quite properly cited both these cases as supporting its decision.

It is true that *Nederlandsche Handel-Maatschappij, N.V.* v. *Sentry Corp.*, *supra*, 163 F. Supp. 800 (E.D. Pa. 1958) apparently interprets Pennsylvania law to preclude a decree relating to securities located outside of that state. However, Connecticut follows no such restrictive view of *in personam* jurisdiction. *See, e.g.*, *Mead* v. *N. York, Housatonic & Northern R.R. Co.*, *supra*, 45 Conn. 199, 223 (1877); *Fleming* v. *Gray Manufacturing Co.*, *supra*, 352 F. Supp. 724 (D. Conn. 1973).

Furthermore, the *Nederlandsche* court, in interpreting Pennsylvania law, ignores the fact noted by the Court of Appeals herein (See Appendix A to Petition, p.6a), that the "citation [by comment 1 to Uniform Commercial Code §8-317] of *Hodes* v. *Hodes* [*supra*] . . . makes it evident that the drafters of the Code envisioned the exact procedure as was employed by the district court" herein.

Hence, it should be evident that the order herein was proper, and that it is not inconsistent with decisions of other Courts of Appeals which have interpreted §8-317 of the Uniform Commercial Code as enacted in other states.

B. Constitutional Claims

While petitioner makes the claim that the District Court order denies him "due process", he makes clear

that he is not challenging the validity of the Connecticut attachment statutes themselves. (Petition, p. 19). Furthermore, he advises that he is not claiming that "the mechanical steps needed to provide procedural due process were not met in this case." (*Id.*) In view of this, the thrust of his "due process" claim is obscure, to say the least.

This is particularly so in that, in this case, petitioner was given a full opportunity to present whatever evidence he chose to present, including the opportunity to take a deposition in Minneapolis, which deposition was then submitted to the court for its consideration in connection with the requested attachment order. Hence, even though petitioner chose not to testify or file an affidavit in support of his own position, petitioner was permitted the discovery he requested and was in no way restricted from fully presenting his position in advance of the entry of the order appealed from.

The Constitution does not require that a "plaintiff fully establish his claim at the hearing" in order to obtain a prejudgment remedy. *Lynch* v. *Household Finance Corporation*, 360 F. Supp. 720 (D. Conn. 1973) [3 judge court]. As this Court said in *Bell* v. *Burson*, 402 U.S. 535, 540 (1971):

> "Since the only purpose of the provisions before us is to obtain security from which to pay any judgments against the licensee resulting from the accident, we hold that procedural due process will be satisfied by an inquiry limited to the determination whether there is a reasonable possibility of judgments in the amounts claimed being rendered against the licensee."

As such, the applicable standard in this case was a "probable cause" standard, which standard has been more than amply satisfied by respondent. Indeed, respondent would assert that the undisputed evidence of record is sufficient to establish its claim under any standard.

In particular, it was undisputed that, as found by the District Court, respondent obtained a letter of credit from the First National Bank of St. Paul to secure a loan made to Coronado by the Banque Scandinave en Suisse, that pursuant to the Indemnity and Guaranty Agreement upon which this suit is based, petitioner agreed to indemnify and hold respondent harmless from any and all liability it might actually be called upon to pay by reason of, *inter alia*, its obligations under its application for letter of credit, that $250,000 was paid by respondent to the First National Bank of St. Paul after that bank made payment to Banque Scandinave en Suisse under the letter of credit, and that petitioner has not yet reimbursed the respondent for this $250,000 payment.

As to the purported counterclaims, Judge Newman properly noted in his opinion that under the Federal Rules, a judge has discretion to treat claims and counterclaims separately, see Rule 54(b) of the Federal Rules of Civil Procedure, and thus can properly treat them as separate matters for purposes of attachment. Hence, the mere assertion of a counterclaim does not preclude a finding of probable cause on the respondent's complaint.

Furthermore, petitioner's "substantial" defenses and counterclaims in this case are totally unsubstantiated on the record.

As Judge Newman observed:

> "It is significant that plaintiff has submitted affidavits in support of its claim while the defendant's own claims remain unsubstantiated apart from the allegations of the pleadings and the arguments of counsel." (Appendix C to Petition pp. 14a-15a).

It is also perfectly clear that there is no proper issue of substantial contacts in this case, such as was involved in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945) and *Shaffer* v. *Heitner* U.S. ,53 L.Ed. 2d 683 (1977), cases which petitioner cites but then concedes are "not directly applicable." (Petition, p.21) Rather, in this case, petitioner is a resident of Connecticut where this action is pending, who was served personally in such state, and over whom there is conceded *in personam* jurisdiction.

Under these circumstances, it is clear that the District Court's order was fully justified, and that the petitioner was not denied his constitutional rights. In fact, as to the $7,500 worth of property which the petitioner admits having in Connecticut, he has posted a bond in lieu of attachment thereof, and this aspect of the court's order is not in dispute.

The opportunity given the petitioner to present his case exceeded the opportunity normally accorded to consumers and other average citizens of Connecticut whose bank accounts and other assets are routinely tied up by their creditors under Connecticut law. Yet, it would appear that the effect of an order of the sort involved here, relating to securities held abroad by an affluent person such as the petitioner, is far less significant than an order tying up the average citizen's

life savings. In this context, it would surely be standing the Constitution on its head to hold that, for some reason, petitioner's assets cannot constitutionally be subjected to attachment notwithstanding the showing of probable cause which was made in this case.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, should be denied.

Respectfully submitted,

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